JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EVA CARE GROUP, LLC,

Plaintiff,

v.

KATHY A. BARAN,

Defendant.

Case No.: CV 17-4250-DMG (JPRx)

ORDER RE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT [28] [29]

Before the Court are the parties' cross-motions for summary judgment. [Doc. ## 28, 29.] The Court deems these motions appropriate for decision without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. L.R. 7-15. For the reasons set forth below, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiff Eva Care Group, LLC's motion for summary judgment, **DENIES** Defendant Kathy A. Baran's motion for summary judgment, and **REMANDS** this matter to U.S. Citizenship and Immigration Services ("USCIS") for further proceedings consistent with this Order.

I.

PROCEDURAL BACKGROUND

On June 8, 2017, Plaintiff Eva Care Group, LLC filed a Complaint seeking declaratory and injunctive relief under the Administrative Procedure Act ("APA") against Defendant Kathy A. Baran, the Director of the California Service Center of USCIS. [Doc. # 1.] After the Court denied Defendant's motion to dismiss the Complaint [Doc. ## 18, 19], Defendant filed an Answer on March 2, 2018. [Doc. # 20.] The Court later denied Plaintiff's motion for judgment on the pleadings. [Doc. ## 25, 27.]

On April 27, 2018, the parties filed cross-motions for summary judgment ("MSJs"). [Doc. ## 28, 29.] The MSJs have since been fully briefed. [Doc. ## 31, 32, 33, 34.]

II.

THE H-1B VISA PROGRAM

In its Order denying Defendant's motion to dismiss, the Court provided an overview of the H-1B visa program that is incorporated herein by this reference. *See* Order Denying Def.'s Mot. to Dismiss at 1–2 [Doc. ## 18, 19].[1]

III.

FACTUAL BACKGROUND[2]

On April 1, 2016, Plaintiff filed an I-129 petition on behalf of [redacted] seeking to accord her nonimmigrant H-1B status. Plaintiff's Statement of Uncontroverted Facts ("PSUF") at ¶ 1 [Doc. # 28-1]; Defendant's Statement of Uncontroverted Facts ("DSUF") at ¶ 1 [Doc. # 30-1]. On June 20, 2016, USCIS approved the petition and granted [redacted] request for a change of status to H-1B to commence on October 1, 2016 and end on August 8, 2019. *See* Compl. at ¶ 9 ("On June 20, 2016[,] Defendant approved the petition and *granted Beneficiary's request for a change of status to H-1B* to

[1] With the exception of citations to the Certified Administrative Record ("CAR"), all page references herein are to page numbers inserted by the CM/ECF system.

[2] The facts recited in this section are uncontroverted.

commence October 1, 2016.") (emphasis added) [Doc. # 1]; Answer at ¶ 9 (admitting paragraph 9 of the Complaint) [Doc. # 20]; CAR at 43–44 (I-797A Notice of Action, which states that "[t]he above petition *and change of status* have been approved") (emphasis added). On July 20, 2016, Plaintiff filed a written request to withdraw the petition because [redacted] intended to complete her studies and obtain her master's degree. *See* CAR 46–47. On September 16, 2016, USCIS issued a Notice of Decision stating that "the petition [was] automatically revoked as of the date of th[e] notice" because "[t]he petitioner/employer ha[d] filed a written withdrawal of the petition." *Id.* at 49.

On March 7, 2017, Plaintiff filed another I-129 petition that sought nonimmigrant H-1B status for [redacted]. PSUF at ¶ 7; DSUF at ¶ 4. In the petition, Plaintiff asserted that [redacted] was exempt from 8 U.S.C. section 1184(g)(1)(A)'s numerical limitation on the number of aliens who may be provided H-1B status in fiscal year 2017 (*i.e.*, "cap-exempt").[3] CAR at 31. On March 27, 2017, USCIS issued a Notice of Intent to Deny ("NOID") the petition on the grounds that [redacted] could not be considered cap-exempt because the agency purportedly revoked the first petition before October 1, 2016 (*i.e.*, the start of fiscal year 2017), and "the numerical limitation for the CAP of [that] fiscal year [had] already been completed." *See id.* at 34–35; PSUF at ¶ 9; DSUF at ¶ 5. On April 27, 2017, Plaintiff responded to the NOID by asserting that [redacted] was cap-exempt because she had already been counted against the cap for fiscal year 2017. *See* CAR 36–40; PSUF at ¶ 10; DSUF at ¶ 6. On May 3, 2017, USCIS issued a decision denying the petition for essentially the same reasons that were provided in the NOID. *See* CAR 2–4;

[3] Title 8 U.S.C. section 1184(g)(7) provides in pertinent part:

> Any alien who has already been counted, within the 6 years prior to the approval of a petition[,] . . . toward the numerical limitations of paragraph (1)(A) shall not again be counted toward those limitations *unless the alien would be eligible for a full 6 years of authorized admission at the time the petition is filed.*

See 8 U.S.C. § 1184(g)(7) (emphasis added). This Order refers to the italicized text as the "unless clause" of Section 1184(g)(7).

PSUF at ¶ 11; DSUF at ¶ 7. Plaintiff challenges this decision. *See* Compl. at ¶¶ 16–17, 23 [Doc. # 1].

IV.
LEGAL STANDARDS

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *accord Wash. Mut. Inc. v. United States*, 636 F.3d 1207, 1216 (9th Cir. 2011). In an action under the APA, a court may set aside an agency's action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(C). "The 'arbitrary or capricious' standard is appropriate for resolutions of factual disputes implicating substantial agency expertise[,]" whereas "[p]urely legal questions are reviewed *de novo*." *Akiak Native Cmty. v. U.S. Postal Serv.*, 213 F.3d 1140, 1144 (9th Cir. 2000). An agency decision is "arbitrary and capricious" if it is not supported by "substantial evidence[,]" which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *See ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1072 (9th Cir. 2015) (quoting *Bonnichsen v. United States*, 367 F.3d 864, 880 n.19 (9th Cir. 2004)) (internal quotation marks omitted). "Generally, judicial review of an agency decision is limited to the administrative record." *First Nat. Bank & Trust, Wibaux, Mont. v. Dep't of Treasury*, 63 F.3d 894, 897 (9th Cir. 1995).

V.
DISCUSSION

Defendant argues that [redacted] was not cap-exempt because USCIS did not count her toward fiscal year 2017's cap, given that Plaintiff withdrew the first petition before [redacted] H1-B status could take effect on October 1, 2016. *See* Def.'s MSJ at 8. Defendant further claims that even if USCIS did count [redacted] toward the cap, she still was not cap-exempt because [redacted] would have been eligible for a full six years of authorized admission at the time the second petition was filed. *See id.* Plaintiff counters that [redacted] is cap-exempt because USCIS counted [redacted] toward the cap when it granted her request

for a change of status, and her eligibility for a full six years of authorized admission has no bearing on whether USCIS could count her toward fiscal year 2017's cap a second time. *See* Pl.'s MSJ at 12–15;Pl.'s Opp'n re Def.'s MSJ at 14–21. To the extent relevant and necessary to the disposition of the instant MSJs, the Court addresses each of these issues.

A. [redacted] Was Counted Toward the Cap for Fiscal Year 2017

In denying Defendant's motion to dismiss the Complaint, the Court concluded that USCIS counted [redacted] toward the cap for fiscal year 2017. *See* Order Denying Def.'s Mot. to Dismiss at 4–6 [Doc. ## 18, 19]. The Court reasoned that the text of 8 U.S.C. section 1184(g) and USCIS's regulations and interpretive guidance establish that [redacted] was counted toward the cap when the agency approved the first I-129 petition and granted [redacted] request for change of status. *See id.* Defendant challenges this conclusion primarily by reasserting arguments that the Court had rejected when it denied the motion to dismiss. *Compare* Def.'s MSJ at 18–22 (arguing that [redacted] could not have been counted toward the cap until fiscal year 2017 began), *with* Mot. to Dismiss at 20–23 (same) [Doc. # 13]. The Court once again rejects these contentions because they are no more persuasive now than they were when Defendant first raised them.[4]

Nonetheless, Defendant does raise several new arguments that warrant discussion. Defendant points out that a page on the USCIS website demonstrates that an alien's status does not change to H-1B until October 1st of the fiscal year in which it is scheduled to take effect. *See* Def.'s MSJ at 23 (citing USCIS, *Extension of Post Completion Optional*

[4] Defendant's MSJ seems to argue that her interpretation of 8 U.S.C. section 1184(g)(1) should be afforded the type of deference described in *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984). *See* Def.'s MSJ at 22–26; *see also Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 825–26 (9th Cir. 2012) (observing that in certain circumstances, *Chevron* provides that an agency's construction of a statute governs). Nonetheless, Defendant retreated from that position by stating that in her reply that "Defendant has consistently called for deference under *Skidmore v. Swift & Company*, 323 U.S. 134 (1944)—not *Chevron*." Def.'s Reply at 4. Accordingly, the weight of Defendant's interpretation depends entirely on its "power to persuade[.]" *See Price*, 697 F.3d at 832 (quoting *Skidmore*, 323 U.S. at 140). For the reasons discussed in Part V.A–B, the Court does not find Defendant's interpretation persuasive.

Practical Training (OPT) and F-1 Status for Eligible Students under the H-1B Cap-Gap Regulations, https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/extension-post-completion-optional-practical-training-opt-and-f-1-status-eligible-students-under-h-1b-cap-gap-regulations (last updated Apr. 19, 2018)). Defendant further contends that several Administrative Appeals Office ("AAO") decisions show that the time an alien spends in the United States in H-1B status counts toward his or her six-year maximum period of authorized stay.[5] *See* Def.'s MSJ at 23–25; Reply at 5 & n.1 (citing AAO decisions lodged in Doc. ## 24-1, 24-2, 24-3, 24-4). Defendant's arguments in this regard are non-sequiturs. The Court has concluded that USCIS may *provide* an alien with nonimmigrant status for the purposes of 8 U.S.C. § 1184(g)(1)—and thereby count that alien toward the cap—prior to the point at which the status *takes effect*. *See* Order Denying Def.'s Mot. to Dismiss at 4–6 [Doc. ## 18, 19.] There is no dispute that an alien's status does not change until the beginning of the fiscal year in which it is scheduled to start.

Additionally, Defendant cites only one AAO decision explicitly finding that an alien must "*hold* H-1B status within the last six years . . . to be considered already counted towards the H-1B numerical limitations." *See In re Petitioner: [Identifying Information Redacted by Agency]*, 2012 WL 9159895, at *3 (AAO July 5, 2012) (emphasis added). Nevertheless, that non-precedential decision[6] is distinguishable because USCIS never granted that beneficiary H-1B status; rather, the alien "was previously admitted to the United States as a Singaporean H-1B1 Free Trade specialty worker." *See id.* at *1. Moreover, the AAO did not support its position that an alien must actually *hold* H-1B status in order to be counted toward the cap with any analysis or

[5] Title 8 U.S.C. section 1184(g)(4) provides that "the period of authorized admission as [an H-1B] nonimmigrant may not exceed 6 years." *See* 8 U.S.C. § 1184(g)(4).

[6] This decision is stored in USCIS's AAO Non-Precedent Decision Repository. *See In re Petitioner: [Identifying Information Redacted by Agency]*, USCIS, https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/aao-non-precedent-decisions (search in search bar for "H-1B1 Free Trade status") (last visited May 20, 2018).

citation to authority. *See id.* at *3. Therefore, the Court need not follow that decision. *See Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1137 (D.C. Cir. 2014) ("[T]he expressly non-precedential nature of the Appeals Office's decision conclusively confirms that the Department was not exercising through the Appeals Office any authority it had to make rules carrying the force of law."); *cf. Garcia-Mendez v. Lynch*, 788 F.3d 1058, 1061 (9th Cir. 2015) ("Generally, when the [Board of Immigration Appeals] addresses a question in an unpublished decision, the agency's ruling is not entitled to deference under *Chevron* . . . .").

Based upon the text of Section 1184(g), the applicable regulations, USCIS's interpretive guidance, and a review of the administrative record, the Court finds that [redacted] was counted toward the cap for fiscal year 2017. Defendant's motion for summary adjudication on this issue is therefore **DENIED** and Plaintiff's motion as to this issue is **GRANTED**.

B. Plaintiff Did Not Effectively Withdraw the First Petition

Defendant contends that Plaintiff effectively withdrew the first I-129 petition pursuant to 8 C.F.R. section 103.2(b)(6). *See* Def.'s MSJ at 20. The Court already rejected this argument when it denied Defendant's motion to dismiss. *See* Order Denying Def.'s Mot. to Dismiss at 6–7 [Doc. ## 18, 19]. The Court reasoned that Plaintiff could not withdraw the first petition because USCIS had already granted [redacted] request for a change of status. *See id.*; 8 C.F.R. § 103.2(b)(6) ("An applicant or a petitioner may withdraw a benefit request at any time until a decision is issued by USCIS or, *in the case of an approved petition, until the person is* admitted or *granted* adjustment or *change of status*, based on the petition.") (emphasis added). Defendant does not even acknowledge that adverse ruling, let alone explain why it was incorrect.

It follows that USCIS did not validly revoke the first petition. In response to Plaintiff's written withdrawal, USCIS purported to "automatically revoke[]" the petition. *See* CAR at 49. Although a USCIS regulation provides that "[t]he approval of any petition is immediately and automatically revoked" if the petitioner "files a written

withdrawal of the petition[,]" *see* 8 C.F.R. § 214.2(h)(11)(ii), there is no indication that this regulation authorizes automatic revocation even if the underlying written withdrawal did not comport with 8 C.F.R. section 103.2(b)(6). *Cf. Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 966 (9th Cir. 2013) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)) ("In interpreting statutes, we observe the 'cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"). Therefore, Plaintiff's alleged withdrawal and USCIS's purported revocation could not prevent [redacted] from holding H-1B status beginning on October 1, 2016.[7]

C. [redacted] Cap-Exempt Status Depends on Whether She Was Eligible for a Full Six Years of Authorized Admission When the Second Petition Was Filed

In ruling upon Plaintiff's motion for judgment on the pleadings, the Court concluded that [redacted] could hold cap-exempt status only if she was not "eligible for a full 6 years of authorized admission" at the time Plaintiff filed the second I-129 petition. *See* Order Denying Pl.'s Mot. for J. on Pleadings at 3–4 [Doc. ## 25, 27]. Relying upon a precedential AAO decision, the Court held that "[t]he 6-year period of authorized admission of an H-1B nonimmigrant accrues only during periods when an alien is lawfully admitted and physically present in the United States." *See id.* at 4 & n.5 (alteration in original) (quoting *Matter of IT Ascent, Inc.*, AAU EAC 04 047 53189 (DHS), 2005 WL 4842028 at *1 (AAO Sept. 2, 2005), *available at* https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/adopted-aao-decisions). The Court denied Plaintiff's motion because

[7] As noted *infra* Part V.D, portions the CAR suggest that [redacted] attended classes at George Washington University during the first quarter of fiscal year 2017. If that is the case, then USCIS may have been authorized to revoke the first petition on the ground that Plaintiff did not employ [redacted] at the start of fiscal year 2017. *See* 8 C.F.R. § 214.2(h)(11)(iii)(A)(1). Before any such revocation could have become effective, however, USCIS was required to afford Plaintiff with notice and an opportunity to be heard. *See id.* § 214.2(h)(11)(iii)(B). USCIS did not use this procedure to revoke the first petition.

"[t]he pleadings in this case do not reveal whether, and if so under what circumstances, [redacted] was lawfully admitted and physically present in the United States between October 1, 2016 (*i.e.*, when [redacted] change of status was scheduled to commence) and March 7, 2017 (*i.e.*, when Plaintiff filed the second petition)." *See id.* at 4.

Plaintiff nonetheless insists that whether [redacted] was eligible for the full six-year period of authorized admission did not affect her entitlement to cap-exempt status. Plaintiff contends that the text of 8 U.S.C. section 1184(g)(7) establishes that eligibility for a full six-year period of authorized admission is merely a necessary, but not a sufficient, condition for being subject to the cap. *See* Pl.'s Opp'n re Def.'s MSJ at 14–18. Plaintiff also argues that "the only intended purpose" of the unless clause is to allow an alien to "recapture" time spent outside the United States such that it does not count against the total amount of time in which the alien may hold H-1B status. *See* Pl.'s MSJ at 15–22. Both arguments lack merit.

First, Plaintiff is correct that the language of Section 1184(g)(7) does not of its own force subject an alien to the cap. Rather, Section 1184(g)(7) provides that in order to claim cap-exempt status, the alien must not "be eligible for a full 6 years of authorized admission at the time the petition is filed." *See* 8 U.S.C. § 1184(g)(7) ("Any alien who has already been counted . . . *shall not* again be counted toward those limitations *unless* the alien would be eligible for a full 6 years of authorized admission at the time the petition is filed.") (emphasis added). On the other hand, if an alien is eligible for a full six years of authorized admission, then USCIS *may* subject that alien to the fiscal year cap. *See id.* Thus, USCIS was barred from counting [redacted] against fiscal year 2017's cap a second time only if she was not eligible for a full six years of authorized admission when the second petition was filed.

Second, the non-precedential AAO decisions and USCIS policy memorandum Plaintiff cites merely indicate that an alien may recapture time spent outside the United States. *See Matter of T-S-, Inc.*, 2017 WL 3453123 (AAO July 15, 2017); *In re Petitioner: [Identifying Information Redacted by Agency]*, 2012 WL 9159895 (AAO July

5, 2012); *In re Petitioner: [Identifying Information Redacted by Agency]*, AAU WAC 08 043 5053 (DHS), 2009 WL 1742074 (AAO Mar. 3, 2009); Memorandum from Michael Aytes, Associate Director, Domestic Operations, *Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-2 Status*, at 4–5 (Dec. 5, 2006), *available at* https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/periodsofadm120506.pdf. These materials do not show that the unless clause's "*only* intended purpose" is to enable such recapturing. *See* Pl.'s MSJ at 17–18 (emphasis added). Further, allowing an alien who is eligible for a full six years of H-1B status to claim the cap-exemption would render the unless clause of Section 1184(g)(7) superfluous, thereby violating a fundamental canon of statutory construction. *See Chubb*, 710 F.3d at 966. Accordingly, the Court rejects Plaintiff's argument that [redacted] cap-exempt status depends solely on whether USCIS counted her toward the cap within the six-year period preceding the second petition.

D. The USCIS Should In the First Instance Determine Whether [redacted] Was Eligible for a Full Six Years of Authorized Admission

"Generally, when an agency commits an error of law, [a federal court] remands to the agency to reconsider its decision as required by law." *See Alaska Trojan P'ship v. Gutierrez*, 425 F.3d 620, 627, 633 (9th Cir. 2005) (announcing this principle in the APA context). Further, the Supreme Court and the Ninth Circuit have recognized a "simple but fundamental rule of administrative law" that courts "must judge the propriety of [agency] action solely on the grounds invoked by the agency." *See Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 786 (2004) (quoting *Sec. & Exch. Comm'n v. Chenery*, 322 U.S. 194, 196 (1947)) (internal quotation marks omitted). If an agency has not considered a dispositive issue, then remand is ordinarily appropriate because "the agency can bring its expertise to bear on the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides." *See Immigration & Naturalization Serv. v. Ventura*, 537 U.S. 12, 17 (2002) (*per curiam*).

There is some evidence in the record suggesting that during the first quarter of fiscal year 2017, [redacted] attended classes at George Washington University. *See, e.g.*, CAR 55–58 (January 20, 2017 letter from Plaintiff stating that [redacted] completed her master's degree); *id.* at 73–74 (certificate of eligibility showing that USCIS issued [redacted] an F-1 visa on November 4, 2016); *id.* at 93 (January 20, 2017 letter from the university indicating that [redacted] completed her master's degree). Yet, USCIS did not consider whether this evidence demonstrated that [redacted] was "lawfully admitted and physically present in the United States" such that she was not eligible for a full six years of authorized admission at the time that Plaintiff filed the second I-129 petition.[8] *See Matter of IT Ascent, Inc.*, 2005 WL 4842028 at *1. In fact, the agency's decision indicates that it denied the second petition on the ground USCIS had not counted [redacted] toward the cap because the agency properly revoked the first petition. *See* CAR 4. This Court has held that both of these conclusions were errors of law. *See supra* Part V.A–B. Accordingly, it is appropriate to remand this matter to USCIS to enable it to make the determination of six-year eligibility in the first instance. *Cf. Casares-Castellon v. Holder*, 603 F.3d 1111, 1113 (9th Cir. 2010) (*per curiam*) (remanding to an agency because it erroneously denied an application for cancellation of removal on procedural grounds and did not consider the merits of the application); *Reyes-Reyes*, 384 F.3d at 789 (remanding to an agency because it applied an incorrect legal standard to an alien's application to withhold removal); *Beard v. Glickman*, 189 F. Supp. 2d 994, 998, 1004–05 (C.D. Cal. 2001) (holding in an APA action that remand was appropriate because it was unclear whether the agency had considered the merits of plaintiffs' equitable claim).

[8] Plaintiff apparently concedes that [redacted] was eligible for a full six years of authorized admission when it filed the second petition. *See* Pl.'s Opp'n re Def.'s MSJ at 14 n.1 ("To be clear, we do not debate whether [redacted] is still eligible for a full 6 years. She is."). It is unclear whether Plaintiff has taken into account the fact that USCIS failed to properly revoke the first petition. In any event, Plaintiff has made an assertion of law that does not constitute a binding judicial admission. *See* 32 C.J.S. Evidence § 542 (2018) (footnotes omitted) ("A judicial admission, to be binding, must be one of fact and not a conclusion of law . . . .").

Because the Court does not determine at this stage whether Plaintiff is entitled to the relief it seeks (*i.e.*, an order requiring USCIS to grant the second visa petition), the Court **DENIES** the remainder of Plaintiff's and Defendant's respective MSJs.

VI.
CONCLUSION

In light of the foregoing, the Court: (1) **GRANTS IN PART** and **DENIES IN PART** Plaintiff's motion for summary judgment, (2) **DENIES** Defendant's motion for summary judgment, and (3) **REMANDS** this matter to USCIS for proceedings consistent with this Order. The May 25, 2018 hearing is **VACATED**.

IT IS SO ORDERED.

DATED: May 23, 2018

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE